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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

NO. 71-1334

TWENTIETH CENTURY-FOX FILM CORPORATION,

Petitioner,

vs.

VICTOR DESNY,

Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION THREE

LUDWIG H. GERBER
Attorney for Respondent
9000 Sunset Boulevard
Los Angeles, California
213-272-6722

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TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The above named Respondent respectfully submits this response to the Petition for a Writ of Certiorari to review the

judgment and the opinion of the Court of Appeal of the State of California, Second Appellate District, Division Three, entered in the matter of Victor Desny, Plaintiff, vs. Twentieth Century-Fox Film Corporation, Defendant, on January 20, 1972.

The unpublished Opinion of the said Court of Appeal appears in Appendix A of the Petition and the Order of the trial court appears as Appendix B in said Petition.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court under 28 U.S.C., Section 1257, without further elaboration. The foregoing ignores Rule 19, entitled "Considerations Governing Review on Certiorary, Rules of the Supreme Court", the application of which, Respondent submits, would have been of assistance to this Court

as well as to Respondent in determining what basis Petitioner believes this matter properly before this Court.

The jurisdiction of the Supreme Court to review state judgments is strictly limited to questions depending upon the Constitution, laws or treaties of the United States. A petition for certiorari which fails to show that such a question was necessarily passed upon by the highest state court presents nothing for review by the Supreme Court.

The Supreme Court is not a court of errors and appeals in the same sense as most highest state courts. If further review is to be had by the Supreme Court it must be because of the public interest in the questions involved. (Chief Justice Hughes, S. Rep. No. 711, 75th Cong., 1st Sess., p. 39)

Of course, as pointed out by Mr.

Justice John M. Harlan, the principles governing the exercise of certiorari jurisdiction, which are set forth in Rule 19 of the Court's Revised Rules, while reflecting these fundamental considerations, are subject to many refinements ("Manning the Dikes"; Some Comments on the Statutory Certiorari Jurisdiction and Jurisdictional Statement Practice of the Supreme Court of the United States; the 18th Annual Benjamin N. Cardozo Lecture delivered before The Association of the Bar of the City of New York, October 28, 1958).

However, as Mr. Justice Harlan points out, many petitions for certiorari--and the within Petition in particular, Respondent submits--reflect a fundamental misconception as to the role of the Supreme Court in our constitutional system.

It is submitted that Petitioner has presented nothing which should warrant

this Court accepting jurisdiction of the said Petition.

QUESTION PRESENTED

It is submitted that the reason for Petitioner's lack of reference to Rule 19 may be the same quandry as the one which confronts Respondent, to wit: where in the purported "Question Presented" does Petitioner find any application to any portion of the Rule enunciated as a basis governing review on certiorari by this Court?

The within Petition is a virtual invitation by Petitioner to this Court to indulge its time in speculating upon whether, in passing upon the questions involved in Lear vs. Atkins, 395 U.S. 653 (1969), it was sublimably considering that the application of the law of patents as therein involved might be equally applicable to the law of copyrights under a

conjectural state of facts challenging the legal imagination of the Justices of this Court who, Petitioner apparently believes, have ample opportunity and inclination to indulge in such fantasies.

Respondent concedes that such a suggestion borders on the frivolous but in justification submits that the foregoing is, in its practical effect, the extent of Petitioner's suggestion of a "Question Presented".

Nor, is Petitioner's pragmatic reference to the "paramaters of the California Rule" as purportedly set forth in Desny vs. Wilder, 46 Cal 2d 715, 299 P.2d 257 (1956), with nothing more, of any additional assistance in divining a federal question, or any question, justifying this Court's time and consideration.

It is wholly conclusionary on the part of the Petitioner to contend that

the question in Lear vs. Atkins, supra, "posed a closely related question," and it nearly connotes effrontery to represent to this Court that "the California Supreme Court has since refused to consider cases, including this case, which pose the question" without citing to this Court any such cases. Respondent respectfully suggests that such cases properly within the purview of Lear vs. Atkins, supra, are non-existent.

Again, resorting to the words of Mr. Justic e Harlan, a showing that a substantial federal question was necessarily decided by the highest court of the state to which resort could be had is an indispensable requirement of a petition for certiorari addressed to a state court judgment. (28 USC. Section 1257(3))

Such a showing must be precise both as to the existence of a federal question,

which goes to the jurisdiction of the Supreme Court, and as to its substantiality, which bears upon the exercise of the Court's discretion to grant or refuse the writ. Moreover, even if such a question was decided by the state court, it must also appear that its judgment cannot be supported on some acequate independent state ground, for if the judgment may be attributed to such a ground the petition can not be entertained. (See, e.g., Staub vs. City of Baxley, 355 U.S. 313; National Association for the Advancement of Colored People vs. Alabama, 357 U.S. 449)

Secondly, Mr. Justice Harlan suggests that the cornerstone of a petition for certiorari in a federal case is a showing that the question sought to be reviewed is one of general importance. Review by certiorari is "in the interest of the law, its appropriate exposition and enforcement, not in the mere interest of the litigants."

(Chief Justice Hughes, S. Rep. No. 711, 75th Cong., 1st Sess., p. 39; see Layne & Bowler Corporation vs. Western Well Works, 261 U.S. 387, 393.)

The fact that a case may have been wrongly decided between the parties, is not, standing alone, enough to assure certiorari. Conversely, of course, the fact that a case may have been rightly decided is not in itself sufficient to preclude certiorari.

Further, adapting the statements of Justice Harlan to the case at issue, the most assured way of satisfying the requirement of Rule 19 that "special and important reasons" for review exist is to show that the issue sought to be reviewed involves a conflict of decisions among the courts below on a point of federal law. In such a case certiorari will usually be granted to resolve the conflict, for

uniformity in the law throughout the federal system is clearly something of prime importance even though a petition for certiorari grounded on a "conflict" must be measured against some important limitations and qualifications surrounding this ground for review.

The differences between the courts below will not be accepted as a conflict if they can fairly be accounted for on the basis of variation in the factual situations among the cases involved. Finally, even where a true conflict may be said to exist certiorari will sometimes be denied where it seems likely that the conflict may be resolved as a result of the future cases in the courts below, or where the impact of a conflict is narrowly confined and is not apt to have continuing future consequences.

The nub of all these qualifications

is that a conflict of decision may safely be relied on as a ground for certiorari only in instances where it is clear that the conflict is one that can be effectively resolved by the Supreme Court alone, and that the disagreement among the lower courts is one that should promptly be resolved.

Respondent respectfully submits that the latter statements have particular application to this Court's decision in Lear vs. Atkins, 395 U.S. 653 (1969) which, in a sense, is an interlocutory decision plainly contemplating therein that the primary question involved must first be resolved by the California Supreme Court and that it is anticipated that no definitive and decisive action on the part of this Court may be necessary under the facts of that case. Where, then, we may inquire respectfully, lies

evidence of a conflict?

Finally it is respectfully reiterated that Petitioner has presented no question to this Court justifying the exercise of review on certiorari and the Court's attention is respectfully invited to the fact that even Petitioner has candidly refrained from labeling the purported "question presented" as a "federal" question.

CONSTITUTIONAL PROVISIONS AND STATUTES

Once again, Petitioner has left to the conjecture of this Court what significance in connection with its Petition it attributes to the United States Constitution, Article I, Section 8, Clause 8, and the Copyright Law, 17 U.S.C., Section 1, et seq. Presumably, Petitioner desires us all to peruse the cited sections as though renewed familiarity will in some manner

reveal the substance of its cause.

Respondent respectfully submits that it is not his function to discourse upon the copyright law and the provisions of the United States Constitution as an abstract exposition of erudition. On the contrary, Respondent perceives his proper role at this point to respond as succinctly as possible to the propositions advanced by the Petitioner. And, Petitioner having advanced none, Respondent accordingly defers.

STATEMENT OF THE CASE

Petitioner's account of the facts of the case is partially correct. It is notably incorrect when it states that "Respondent Victor Desny, without having been requested or invited to do so, submitted a story outline entitled 'Three Decker Widow' to a motion picture director

under contract to Petitioner Twentieth Century-Fox Film Corporation (Fox) by putting the same in an envelope addressed to the director and leaving it with the secretary in Fox's story department", and that the same was "his unsolicited submission". The inaccuracy relates to the terms "without having been requested to do so" and "unsolicited submission".

On the contrary, the uncontradicted evidence in this regard was that Respondent was, and had been, well known to director Edmund Goulding, who is the director referred to in Fox's statement. The Respondent had appeared as an actor in several of Mr. Goulding's pictures and prior to the occasion referred to above had submitted to Mr. Goulding at least one other story idea, namely, "The Cave", which submission, incidentally, under virtually the identical circumstances

of the presently concerned submission, was duly noted in Fox's story department records. Respondent testified that this relationship resulted in a conversation with Mr. Goulding's secretary, who was also his sister, in which she stated that her brother would like to read Respondent's story and directed Respondent to deliver the story to the story department of the Petitioner "in care of my brother".

Likewise, it is not entirely accurate to recite, as Petitioner does, that Respondent "had no discussions whatsoever with any representative of Fox concerning the story", which was, under the Petitioner's statement of the case, left "with a secretary in Fox's story department" when applying common knowledge of normal human behavior under such circumstances, a presumption arises that some conversation must have taken place. The trial court

and jury had the benefit of Respondent's statement that he stated to the secretary that he was handing her "a story that Mr. Goulding requested. For you to cover it. And, please, will you see that he gets it after that."

The term "cover" had a definite meaning to Fox and to the court and jury. The evidence disclosed that "cover" meant that the story department made a copy or synopsis of every story or story idea submitted to the studio or any of its employees and duly recorded same on index cards. In the interests of complete accuracy, the evidence did not disclose any copy of the said story nor the existence of any index cards concerning same, although the record was complete as to the submission and the covering of the other story submission hereinbefore referred to as "The Cave".

Finally, on the subject of the

statement of the case it would appear presumptious to contend that pages 14-16 of the Appendix A "must be deemed to be California's answer to the question this Cout (sic) posed in Lear Inc. vs. Atkins".

In point of fact, Petitioner has taken great liberty with this Court's decision in Lear Inc. vs. Atkins by attributing to it as "the question this Court posed", the inference that after the discussion of inventions and the Patent Law, this Court intended to imply something to the effect that "Every thing we've said about inventions goes double for story ideas -- and you'd better believe it!" This suggestion, of course, is ridiculous but certainly only something almost analagous would justify Petitioner's implication that the Courts of California are defying the mandates of this Court under the allegations made in the Petition.

LEAR INC. VS. ATKINS PRESENTS NO FEDERAL QUESTION OF SUBSTANCE TO BE DECIDED BY THE CALIFORNIA COURTS UNDER THE FACTS OF THE PETITION

Here again, it is submitted that Petitioner has resorted to generalities which deprive this Respondent of an opportunity to meet head-on any contention that would impliedly support the Petition. We must resort to supposition as to what law is referred to as "California Law" and even more so to identify the "Federal question of substance".

Obviously, Petitioner's quotation from Lear Inc. vs. Atkins, taken out of context, that "Federal law requires that all ideas in general circulation be dedicated to the common good unless they are protected by a valid patent" is inapplicable to stories and story ideas which are protectible, in a general sense, not by patent

but by copyright. Nowhere in the Petition is an analogy set forth between the provisions of the patent law and those of the copyright law which Petitioner could claim provides a bridge over which Lear Inc. vs. Atkins could pass in authority from one to the other. Again, we must surmise that Petitioner intends its representations shall stand as authority without delineation of the portions of the two laws which it believes to be persuasive in support of its claim.

In fact, the whole presentation to this Court, as well as to the Courts of California, by Petitioner is based upon an interpretation by Petitioner of the import of the case of Lear Inc. vs. Atkins, 395 US 653.

It is very evident that there are, at least, two contradicting theories, each of which is said to be grounded in Lear

Inc. vs. Atkins, one presented by "Nimmer on Copyrights" adopted by the Opinion of the Court of Appeal (Petitioner's Appendix A pp. 14-16) and the other advanced by Petitioner.

If we subscribe to the interpretation of the opinion of the United States Supreme Court in Lear Inc. vs. Atkins advanced by Professor Nimmer, in his book "Nimmer on Copyrights," pages 734-734.2 (Petitioner's Appendix A p. 14 et seq.), we are constrained to believe that the California law, both as to statute and decision, achieves the end sought by the United States Supreme Court. That is to say, Professor Nimmer opines that it is the intent of that court that the public shall not be denied the benefits and access to new ideas under a theory of an implied contract arising in one claiming to be an originator of said idea. Seemingly, it

is Professor Nimmer's reasoning that the State of California law and observance of a theory of implied contract has exactly the effect desired by the United States Supreme Court, to wit, that in its operation many ideas which might otherwise not come to public attention and inferentially public benefit, are thereby encouraged and do come into the public access. (Petitioner's Appendix A p. 16)

It is submitted that under this reasoning there is no vital necessity for the Supreme Court of California to do other than perhaps to affirm Professor Nimmer's theory in order to meet any mandate which may be inferred in the United States Supreme Court decision in Lear Inc vs. Atkins, supra.

However, on the other hand, are we to subscribe to the position of Petitioner, which incidentally is advanced without any

support in so far as Petitioner suggests any benefit to the public in general, by reading into Lear Inc. vs. Atkins a pronouncement which will destroy the holdings of Desny vs. Wilder, 46 Cal 2d 715, and the cases stemming from this decision? In other words, the Petitioner would have the Supreme Court of the State of California read from the decision of the United States Supreme Court, an absolute and positive admonition that the efficacy and the equity of Desny vs. Wilder, supra, and the cases stemming therefrom, be swept out of California law and that, unless the literary property was copyrighted, there can be no protection whatsoever to an originator of uncopyrighted literary property and that literary products of the mind, if uncopyrighted cannot, as a positive fact, be the subject of an express or implied contract between the parties to the effect that if

used by the "idea recipient", the originating party will be compensated.

The aforegoing seems a harsh and almost absurd contention to be urged upon this Court but, it is respectfully submitted, these very terms are specifically set forth in the Petition.

It is respectfully submitted that this Petitioner is not entirely altruistic in its proposal to this Court. It is indeed most materially interested in forever putting away the theory of implied contracts set forth in Desny vs. Wilder and for a very obvious reason. It is in a business which may be organized and equipped with millions of dollars worth of electronic apparatus, have in its employ dozens of talented and capable actors and actresses, as well as all of the necessary supporting personnel, but which, despite all of this, cannot produce its product without

the product of someone else's mind. That is to say, without the literary property, the plot, the story, and the screenplay, the millions upon millions of dollars invested in the film industry are helpless and wasted. It must be a constant source of irritation to Petitioner and its fellow members of the film industry that in the final analysis they must still be at the mercy of a writer or creator or a literary property.

Let us not be misled by the impression that authors have but to copyright their material, which is admittedly a relatively simple process as compared with the laborious and intricate proceedings leading hopefully to the patenting of an invention, to protect their literary property. As simple and ministerial a proceeding as registering under the Copyright Act is, the Act does have its limitations

in that "story ideas" and "plot ideas", as defined in the present proceedings, are not under definition, copyrightable, since it is the writings of authors which are protectible and the fact that a list of words is in writing or on a sheet of disjointed phrases or sentences, does not entitle the same to protection.

Yet Petitioner traffics in "story ideas" and "plot ideas" ... "if they are on paper" (Rep Tr p. 257, lines 19-21) and even though they may be "as short as one paragraph or one page." (Rep Tr p. 276, lines 7-9) It is submitted that it is of no particular significance that at the latter point in the testimony the reference was to "stories" since it is obvious from the context of the testimony that "story ideas", "plot ideas" and "stories" were, in the minds and intentions of the witness and examiners, synonymous.

The material submitted need not be novel or original, because recovery is being sought on the basis of contractual agreement, not on the ground that property rights under California Civil Code, Section 980 are being invaded. Therefore, while questions of originality and novelty may be pertinent where property rights are asserted, such considerations are clearly out of place here. Studios frequently purchase non-novel ideas, and such ideas have formed the basis of many successful motion pictures. (Kurlan v. Columbia Broadcasting System, 40 Cal 2d 799, 810, 256 P. 2d 962, 970 (1953).)

The audacity of Petitioner in castigating the California courts for failing and refusing "to acknowledge either the implications or the supremacy of Sears, Compco and Lear in the implied submission agreement context," measured by Petitioner's

monsterous statement that the aforecited cases "signalled a fundamental change in the law of ideas by emphasizing the primacy of the principle that ideas not protected by patent or copyright are available to all," disregarding in each instance that this Court has included the phrase in qualification, "ideas in general circulation," is to strip Petitioner of all pretension of equity and good conscience and expose to this Court the true basis of Petitioner's position and the callous and decadent juristic depths to which it apparently believes the United States Supreme Court, and inferentially, the whole system of American justice, has succumbed.

To assert that the facts of this case exemplify conduct on the part of Petitioner and its ilk, which is exonerated -- nay, exalted -- by the decision in Lear Inc. vs. Atkins is to claim that the United States

Supreme Court has given Petitioner a license to steal, which Petitioner has the temerity to ask this Court to ratify.

Truly, this is an ideal case to demonstrate the immunities Petitioner believes itself cloaked with and the practical effect and application of Lear Inc. vs. Atkins, according to the gospel of its counsel.

The basic paupacity of Petitioner's position is never more evident than in the dying gasps of its Petition when it decries a fancied "rule of law which permits a jury to find an implied contract requiring payment for the use of common uncopyrighted ideas where there have been no writings, words, meaningful conduct or mutual intent". Petitioner certainly cannot be referring to any such rule of law prevailing in California as every one of the Petitioner's numerous references

to California cases will attest; in every instance where relief was granted there was either writings, words, meaningful conduct, or mutual intent found.

Lastly, no "publishers, broadcasters, and entertainment producers" have ever been forced "to pay tribute for using the commonest ideas" unless it has been proved that the said ideas were first unilaterally denominated "common" by the idea recipients after the latter had come into full possession of the idea under circumstances found by the court to amount to a promise to pay for the same. Surely Petitioner cannot expect this Court to sanctify a relapse into a legal wilderness where might will make right and the intellectual creator will be forced singlehandedly into unequal joust with rapacious legions whose greed and avarice recognize neither law nor equity.

CONCLUSION

Respondent respectfully submits that law and equity with respect to protection of literary property have been well served by the Courts of California, both in the interest of the writer and the idea recipient, and with full cognizance of the copyright law and the rules of contract.

A Petition for review on certiorari which reveals no fruitful grounds for this Court's examination should be denied.

Respectfully submitted,

LUDWIG H. GERBER

Attorney for Respondent
9000 Sunset Boulevard
Los Angeles, California